Gunasingam a/l Ramasingam v United Malayan Banking Corp and another appeal

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEALS NO W–08–226 OF 1997 AND NO W–08–184 OF 1997
GOPAL SRI RAM, SITI NORMA YAAKOB AND MOKHTAR SIDIN JJCA
19 JUNE 2001

Civil Procedure *— Appeal — Leave to appeal — Appellant filed motion on 17 March 1997 seeking leave to appeal against registrar's order dated 26 May 1992 — Whether appellant in reality asking for extension of time to appeal — Considerable delay involved in moving court — Legitimate expectation of respondent — Whether court should exercise discretion in appellant's favour or dismiss motion*

Civil Procedure *— Appeal — Leave to appeal — Appellant filed motion on 7 July 1997 for leave to appeal against judgment dated 23 May 1995 — Time delay in filing of motion — Whether court should exercise discretion in appellant's favour or dismiss motion*

Civil Procedure *— Jurisdiction — Court of Appeal — Appellant sought to appeal from order of High Court registrar — Whether Court of Appeal had jurisdiction to entertain appellant's application*

These two separate applications for leave involved common issues. In both applications, a motion was taken out before the court which sought leave to appeal, with a second application filed in the same proceedings which sought leave to adduce further evidence. In the first application, a finance company had issued a writ on 11 December 1990 against the guarantor appellant to recover a sum of money, but the latter was absent at the hearing of the summons and the registrar entered judgment against him on 26 May 1992. On 17 March 1997, the appellant took out the motion before this court seeking leave to appeal against the order dated 26 May 1992, followed by the application to adduce further evidence. In the second motion, the respondent bank obtained judgment against the appellant on 23 May 1995 and the appellant only filed the motion for leave on 7 July 1997.

Held, dismissing the applications:

(1) The appellant in the first application sought, in essence, to appeal against an order from which no appeal laid to this court, which was only conferred with jurisdiction to hear appeals against orders made by a High Court judge in his original and appellate jurisdiction. The present application was an attempt to appeal against the order of the registrar of the High Court, which this court had no jurisdiction to entertain (see p 36D–E).

(2) Although the motion in the first application sought leave to appeal, the court was of the opinion that the appellant was really asking for an extension of time to appeal. Even with greater leeway to the appellant acting in person and taking the order to have been from a High Court judge, the delay in moving this court was

considerable — more than two years. To extend time now would cause much injustice to the finance company by destroying its assumption and legitimate expectation that the appellant had decided not to challenge the order and that litigation was finally at an end (see p 36E–G). Taking into account all relevant considerations, the court exercised discretion against the appellant and with the dismissal of the motion, the application to adduce fresh evidence fell as well (see p 36H).

(3) The time delay in the filing of the second motion was 'simply horrific'. All that was said by the court in respect of the finance company was applicable with full force to the bank. Discretion was similarly exercised against the appellant and the application to adduce further evidence fell with the dismissal of the motion (see p 37A–B).

[**Bahasa Malaysia summary**

Kedua-dua permohonan berasingan untuk kebenaran tersebut melibatkan persoalan-persoalan yang sama. Dalam kedua-dua permohonan tersebut, satu usul telah dimulakan di hadapan mahkamah yang memohon kebenaran untuk membuat rayuan, dengan satu permohonan kedua yang telah difailkan dalam prosiding yang sama yang memohon kebenaran untuk mengemukakan keterangan selanjutnya. Dalam permohonan pertama, sebuah syarikat kewangan telah mengeluarkan satu writ pada 11 Disember 1990 terhadap penjamin perayu untuk mendapat kembali sejumlah wang, tetapi penjamin perayu tidak menghadirkan diri pada perbicaraan saman tersebut dan pendaftar telah memasukkan penghakiman terhadap beliau pada 26 Mei 1992. Pada 17 Mac 1997, perayu telah memulakan usul di hadapan mahkamah ini memohon kebenaran untuk merayu terhadap perintah bertarikh 26 Mei 1992 diikuti dengan permohonan untuk mengemukakan keterangan selanjutnya. Dalam usul kedua, responden bank telah memperoleh penghakiman terhadap perayu pada 23 Mei 1995 dan perayu hanya telah memfailkan usul untuk kebenarna tersebut pada 7 Julai 1997.

Diputuskan, menolak permohonan-permohonan tersebut:

(1) Perayu dalam permohonan pertama memohon, pada dasarnya, untuk merayu terhadap perintah di mana tiada rayuan boleh didengari dalam mahkamah ini, di mana hanya diberikan bidang kuasa untuk mendengar rayuan-rayuan terhadap perintah-perintah yang dibuat oleh seorang hakim Mahkamah Tinggi dalam bidang kusa asal dan rayuan beliau. Permohonan sekarang ini adalah satu percubaan untuk merayu terhadap perintah pendaftar Mahkamah Tinggi, di mana mahkamah ini tidak mempunyai bidang kuasa untuk mendengar (lihat ms 36D–E).

(2) Walaupun usul dalam permohonan pertama memohon kebenaran untuk membuat rayuan, mahkamah berpendapat bahawa perayu sebenarnya meminta untuk satu lanjutan masa untuk merayu. Walaupun dengan memberi peluang yang lebih kepada perayu untuk bertindak dengan sendiri dan menganggap perintah tersebut adalah daripada seorang hakim Mahkamah Tinggi, kelewatan menggesa mahkamah ini terlalu lama — lebih dua tahun. Untuk melanjutkan masa sekarang akan menyebabkan ketidakadilan yang ketara kepada syarikat kewangan dengan memusnahkan anggapan dan harapannya yang munasabah bahawa perayu telah memutuskan untuk tidak mencabar perintah tersebut dan bahawa litigasi tersebut akhirnya selesai (lihat ms 36E–G). Dengan mengambilkira semua pertimbangan-pertimbangan yang relevan, mahkamah menggunakan budi bicara terhadap perayu dan dengan penolakan usul tersebut, permohonan untuk mengemukakan keterangan baru juga gagal (lihat ms 36H).

(3) Masa kelewatan dalam pemfailan usul kedua sememangnya 'melampau'. Apa yang boleh dikatakan oleh mahkamah berhubung syarikat kewangan tersebut terpakai sepenuhnya kepada bank. Budi bicara yang sama digunakan terhadap perayu dan permohonan untuk mengemukakan keterangan selanjutnya gagal dengan penolakan usul tersebut (lihta ms 37A–B).]

Notes

For cases on leave to appeal, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 892–945.

For cases on jurisdiction of the court, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3624–3889.

Legislation referred to

Courts of Judicature Act 1964 s 68

Gunasingam a/l Ramasingam representing himself as the appellant in Civil Appeal No W–08–226 of 1997 and Civil Appeal No W–08–184 of 1997.

James Selva (*Ong Kok Bin & Co*) for the respondent in Civil Appeal No W–08–226 of 1997.

Aimee Liew (*Mah-Kamariah & Partners*) for the respondent in Civil Appeal No W–08–184 of 1997.

Gopal Sri Ram JCA. (delivering judgment of the court): We heard and dismissed these two separate applications for leave on two consecutive days according to the order in the list of cases, but I think that a single judgment is sufficient to dispose of both of them because of the common issues which they both give rise to.

As long ago as 11 December 1990, MBF Finance Bhd ('the finance company') issued a writ, inter alia, against the appellant as guarantor to recover the sum of RM338,744.16 and consequential relief. Later, the finance company took out a summons for judgment. That summons was returned before the registrar in chambers on 26 May 1992. The appellant was absent at the hearing of the said summons. Judgment was accordingly entered against him. The appellant then applied to have this judgment set aside. The registrar dismissed that application on 28 September 1992. A further summons was then taken out by the appellant seeking extension of time to lodge an appeal against the registrar's order. That summons came before the judge in chambers and was dismissed on 17 January 1995. On 14 June 1996, the appellant was adjudged a bankrupt. On 17 May 1997, the appellant took out a motion in this court seeking leave to appeal against the order of the registrar dated 26 May 1992. That application was registered as Civil Appeal No W–08–184–97. A second application was filed in the same proceedings by the appellant seeking leave to adduce further evidence. We heard both applications and dismissed them on 19 June 2000.

There are two main reasons for the dismissal. Firstly, the appellant is in essence seeking to appeal against an order from which no appeal lies to this court. We are only conferred with jurisdiction to hear appeals against orders made by a High Court judge in his original and appellate jurisdiction. And there are restrictions upon that, for example, under s 68 of the Courts of Judicature Act 1964. This is an attempt to appeal against the order of the registrar of the High Court. We plainly have no jurisdiction to entertain such an appeal.

Secondly, although the motion seeks leave to appeal, what I think the appellant is really asking for is an extension of time to appeal. Since the appellant is acting in person, I am prepared to give him greater leeway than I would have been prepared to grant a solicitor and overlook the elementary errors he has made. Even so, and taking the order in question as being that of the judge, the delay in moving this court is considerable — more than two years. To extend time now would cause much injustice to the finance company. The appellant having done nothing over a substantial period of time, the finance company was entitled reasonably to assume that the appellant had decided not to challenge the order of the judge. To permit an extension would, therefore, destroy that assumption — a legitimate expectation in the finance company that litigation was finally at an end.

After taking into account all relevant considerations, I formed the view that discretion should be exercised against the appellant. My learned sister Siti Norma Yaakob and my learned brother Mokhtar Sidin JJCA were in agreement with my views upon the application. Accordingly, we dismissed the appellant's substantive motion for leave. With the dismissal of that motion, the application to adduce fresh evidence fell as well and was dismissed.

The facts in respect of the second motion are equally straightforward. The respondent to this motion (entered as Civil Appeal No W–08–226–97)

is the United Malayan Banking Corp Bhd ('the bank'). Here, the judgment against which the appellant complains was entered on 23 May 1995. The motion for leave before us — I think what the appellant seeks is an extension of time — was only filed on 7 July 1997. The delay is simply horrific. All what I said in respect of the finance company in the earlier application applies with full force to the bank. I found no grounds upon which discretion could be exercised in the appellant's favour. Consequently, I came to the conclusion that discretion should be exercised against the appellant. My learned sister Siti Norma Yaakob and my learned brother Mokhtar Sidin JJCA were in agreement with my views upon the application. The motion was therefore dismissed. The application to adduce further evidence fell with it.

All costs in respect of the applications forming the subject matter of this judgment were awarded to the respondents.

Applications dismissed.

Reported by Anita Teo